No. 11,573

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALEXANDER STEELE,
Appellant,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, and ALFRED J. FRITZ and ROBERT MCWILLIAMS, as Judges thereof,
Appellees.

APPELLANT'S PETITION FOR A REHEARING.
(Or, if a Rehearing Be Denied, For a Stay of Mandate.)

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To the Honorable Francis A. Garrecht, Senior Judge and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Alexander Steele, appellant above named, hereby petitions for a rehearing of this cause after decision rendered and filed on December 8, 1947.

The action dismissed by the District Court was one for an injunction to restrain the trial Court from proceeding with the trial of a criminal cause, said

injunctive relief being based on the claim that said criminal cause had been removed to the District Court pursuant to a removal petition filed in accordance with Sec. 31 of the Judicial Code (28 U.S.C.A. 74).

This Court upheld the action of the lower Court on the ground that the facts claimed to justify such removal did not fall within the provisions of the statute providing that such removal can be had where one has been denied "any right secured by any law providing for the **equal** civil rights of citizens of the United States." (Emphasis by this Court.)

In upholding the action of the lower Court this Court held as follows, each of which holdings we believe to be erroneous:

(a) That the use as evidence of articles acquired by an unlawful and unreasonable search and seizure deals exclusively with state procedure relating to the admissibility of evidence;

(b) That the right to admit such articles in evidence was in accordance with "the procedure adopted by the California courts" and, as such procedure "has been applied with **equality** as to all citizens of the United States who come before those courts", it does not violate "some **equal** civil right," as such violation can only occur when there is a discrimination between persons occupying an identical **status,** such as racial discrimination.

In addition to the foregoing, it is submitted that this Court has failed to consider certain important contentions raised by appellant which will hereafter be discussed.

THIS COURT HAS MISCONCEIVED THE PHRASE "EQUAL CIVIL RIGHTS" BY RESTRICTING IT TO CASES WHERE THERE IS AN UNLAWFUL DISCRIMINATION BETWEEN PERSONS EQUALLY SITUATED.

In holding that the Removal Statute can only be invoked where state action has resulted in an unlawful discrimination between persons occupying the same identical positions before the law, this Court has placed a construction upon the Removal Statute sanctioned neither by its words nor by the decisions of the Supreme Court of the United States.

Appellant's contention has been that the Removal Statute becomes operative whenever a state denies a civil right that all persons throughout the United States are entitled to equally enjoy, even though within the geographical limits of the state such denial operates equally upon all persons therein. In other words, state boundaries are wiped out in determining whether an equal civil right has been denied and such denial takes place where the enjoyment of the right is foreclosed, whether such foreclosure operates upon one or a class or all of the persons within the jurisdiction of a particular state. Such is the law as announced by the Supreme Court of the United States.

In *Colgate v. Harvey,* 296 U.S. 404, 80 L.ed. 299, the Supreme Court has laid this proposition at rest in the following holdings:

At page 426, it is stated:

> "But, assuming that the State of Vermont is benefited by the exemption, the complete answer is that appellant is a citizen of the United States;

> and, quite apart from the equal protection of the laws clause, the suggestion is effectively met and overcome, and the fallacy of other attempts to sustain the validity of the exemption here under review clearly demonstrated, by reference to the privileges and immunities clause of the Fourteenth Amendment. 'For all the great purposes for which the Federal government was formed,' this court has said, 'we are one people, with one common country.' Crandall v. Nevada, 6 Wall. 35, 48, 49, 18 L. ed. 745, 748, 749. As citizens of the United States we are members of a single great community consisting of all the states united and not of distinct communities consisting of the states severally. No citizen of the United States is an alien in any state of the Union; and the very status of national citizenship connotes equality of rights and privileges, so far as they flow from such citizenship, everywhere within the limits of the United States. This fact is obvious and vital and no elaboration is required to establish it." (Emphasis supplied.)

The foregoing demonstrates two propositions, viz.: (a) that the privilege and immunity clause of the Fourteenth Amendment is something separate and distinct from the equal protection of the laws clause and (b) that the privilege and immunity clause means that such privileges and immunities must be enjoyed alike by all persons throughout the United States and not merely by all persons within one of the United States. Therefore, an equal civil right means a right that is to be enjoyed by all throughout the United States and an equal civil right is denied when

any one state refuses to enforce it within the confines of its own borders.

Again, in *Colgate v. Harvey,* supra, at page 428, the Supreme Court quotes from the *Slaughter House Case* as follows:

> "But the fourteenth amendment prohibits any state from abridging the privileges or immunities of the citizens of the United States, whether its own citizens or any others. It not merely requires equality of privileges; but **it demands that the privileges and immunities of all citizens shall be absolutely unabridged, unimpaired.**"

Lastly, in *Colgate v. Harvey,* the Supreme Court states:

> "One purpose and effect of the privileges and immunities clause of the Fourteenth Amendment, read in the light of this interpretation, was to bridge the gap left by that article so as also to safeguard citizens of the United States against any legislation of their own states having the effect of denying equality of treatment in respect of the exercise of their privileges of national citizenship in other states. A provision which thus extended and completed the shield of national protection between the citizen and hostile and discriminating state legislation cannot be lightly dismissed as a mere duplication, or of subordinate or no value, or as an almost-forgotten clause of the Constitution."

The foregoing holdings demonstrate the error in this Court's decision. Equality of operation within state limits is not the test. Equality throughout the

United States is the demand of the Constitution and a denial of such equality within any defined portion of the United States constitutes a violation of the Constitution. The right not to be deprived in any way of life, liberty and property, except in accordance with law, is an attribute of United States citizenship. (*Allgeyer v. Louisiana,* 165 U.S. 578, 589, 41 L. ed. 832, 835.) Inherent in the right of liberty is the right to be secure in one's home against unreasonable search and seizure. Where a state denies this right to all within its boundaries, it is denying an equal civil right guaranteed by the Constitution.

We submit that the language of this Court is in conflict with the holdings of the Supreme Court of the United States and, for such reason alone, a rehearing of this cause should be granted.

STATE PROCEDURE AND RULES OF EVIDENCE MAY NOT RUN COUNTER TO CONSTITUTIONAL RIGHTS AND PRIVILEGES.

This Court has upheld the action of the California Courts on the ground that the state decisions, allowing the use as evidence of articles acquired by unreasonable search and seizure, deal merely with state rules of evidence.

The fact that a constitutional right may be denied under the guise of local practice relating to the admissibility of evidence has been refuted by the Supreme Court.

Whether or not an extra-judicial confession is admissible in evidence may be classified merely as a state

rule relating to what is competent evidence at a trial within the state. However, the Supreme Court of the United States has time and again reversed convictions where such confessions were obtained in a manner condemned by the Fourteenth Amendment.

(See:

Brown v. Mississippi, 297 U.S. 278;

Chambers v. Florida, 309 U.S. 227.)

In *Mooney v. Holohan,* 294 U.S. 103, the Supreme Court of the United States held that the knowing use of perjured testimony by state officers for the purpose of procuring a conviction was a denial of a right guaranteed by the Constitution. Here again we have a case where the sole question involved was the admissibility of evidence and the Federal Supreme Court did not brush it aside on such ground.

Where one has a constitutional right, he is entitled to the enjoyment of such right and such enjoyment cannot be defeated by the enactment of a mere rule of evidence.

In *Brown v. Mississippi,* supra and *Angel v. Bullington,* 91 L. ed. Adv. Op. 557, 560, it is expressly held that constitutional rights can not be evaded or denied under the guise of local practice or procedure.

THIS COURT HAS FAILED TO PASS ON ONE OF THE MAIN CONTENTIONS OF APPELLANT, TO-WIT: THAT THE STATE COURT DENIES ANY REMEDY FOR THE PROTECTION OF THE CONSTITUTIONAL RIGHT.

The decision of this Court is confined to the admissibility of evidence, no matter how acquired, at the trial of an accused. We have freely admitted that a trial Court need not stop a trial for the purpose of enquiring into the method by which state evidence was acquired. This is entirely different from a situation where the state has denied any method or procedure, to be resorted to prior to the trial, whereby a determination can be had as to whether the means used for acquiring the evidence violated a constitutional right.

Where the state denies any means, method or procedure for the enforcement or protection of a constitutional right, this, in and of itself, constitutes a violation of a constitutional right.

Rights guaranteed by the Constitution are not mere matters of words. The declarations of such rights carry with them the right and ability to enforce them.

In *Brown v. Mississippi,* supra, the Court closed its opinion by holding that a conviction and sentence procured in an unconstitutional manner could be challenged in any appropriate manner or proceeding. This must mean that the denial of a constitutional right carries with it the inherent right to some process by which such right can be enforced and protected.

In *Silverthorn Lumber Company v. United States,* 251 U.S. 282, papers of the defendants were taken

by Federal officers as the result of an unreasonable search and seizure. A motion for their return was granted. The government had made copies thereof and used such copies for the purpose of procuring new indictments. The Supreme Court held that the new indictments could not be based on copies of evidence unlawfully acquired, that such indictments had to be quashed and the copies of such evidence returned to defendants. Here again we find the Court upholding the right by giving to the accused process for the enforcement thereof. To the same effect is the case of *Nardone v. United States,* 308 U.S. 338.

In the Federal Courts, the rule prevails that a trial need not be stopped in order to enquire into the methods used for the acquiring of evidence, but the Federal Courts accord to an accused remedies, to be exercised prior to the trial, whereby unlawfully acquired evidence can be suppressed. The California Courts have denied such methods of relief and in California there is no way in which the right to be secure from unlawful search and seizure can be protected or corrected once that right has been violated.

We submit that this Court was in error in confining its decision to what could or could not be done at the trial and in failing to consider the denial of all means of redress prior to the trial.

CONCLUSION.

It is respectfully submitted that the decision of this Court is in error and that a rehearing should be granted for the purpose of further arguing and deciding the points hereinabove stated.

In the event of a denial of this petition, appellant asks for a stay of the mandate of this Court for a period of 45 days to enable appellant to apply to the Supreme Court of the United States for a writ of certiorari.

Dated, San Francisco,
January 5, 1948.

Leo R. Friedman,
Attorney for Appellant and Petitioner.

Certificate of Counsel.

I hereby certify that I am counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
January 5, 1948.

Leo R. Friedman,
Counsel for Appellant and Petitioner.